BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

Jurisdiction.

The matters herein involved are the construction of a criminal statute and a question of the admissibility of evidence as to offenses not germane to that charged. Jurisdiction is invoked under U. S. Code Title 28, Section 347 (2) and Supreme Court Rule, number 38, paragraph 5 (b).

Statement.

The facts are stated in the petition.

ARGUMENT.

The Evidence.

The law as to the admission in evidence of "similar offenses" is well stated by the Supreme Court of the United States in *Homer Bird v. United States*, 180 U. S. 356, where on page 360 the Court quoted the law as stated by the Massachusetts Supreme Court in *Commonwealth v. Horton*, 2 Gray, page 354, as follows:

> "It is the universal rule, in the trial of criminal cases, that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. The prosecuting officer is not, therefore, allowed to give evidence of fact tending to prove a similar but distinct offense, for the purpose of raising an inference or presumption that the

> accused committed the particular act with which he is charged. . . . The particular violence threatened was not against the deceased but against another member of the party."

Boyer v. United States, 132 F. 2d, 12 and 13:

> "But the fact that intent is in issue is not enough to let in evidence of similar acts, unless they are so connected with the offense charged in point of time and circumstances as to throw light upon the intent. . . . Nor is this a case of peculiar coincidence in which mere recurrence throws light on mental states. . . . But when the prior crime has no other relevance than that (similarity), it is inadmissible. Its tendency to create hostility, surprise and confusion of issues is thought to outweigh its probative value."

> In *U. S. v. Budd*, 144 U. S. 154, 164, the Court said "because a party has done wrong at one time and in one transaction, it does not necessarily follow that he has done like wrong at other times and in other transactions.
>
> Furthermore, the evidence admitted was not evidence adduced in a proceeding charging a criminal offense but testimony of such a character that it should not be considered as of even value enough on which to base a criminal charge."

In *Simpkins v. United States*, 78 Fed. (2d) 594, a case cited by the United States Supreme Court in *Glasser v. United States*, 315 U. S. 71, on page 597, the Court said:

> "It is a fundamental rule of criminal evidence frequently applied in both State and Federal Courts, that proof of offenses, other than those charged, is

generally inadmissible and constitutes prejudicial error, even though the separate offenses may be of a similar nature."

This rule should be applied strictly under conditions such as exist today or to quote from *Hall v. United States*, 256 Fed. 748, 752, "In a time like this, when patriotism is at a high pitch and many people have to a certain extent lost their mental poise, courts and jurors should be extremely cautious when required to pass upon the rights of an individual charged with an offense, affecting the welfare of the government."

The Statute.

For the Court's ready reference we quote U. S. Code, Title 18, section 89:

"Any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding $1,000 or imprisoned not exceeding five years, or both. (Feb. 14, 1917, c. 64, 39 Stat. 919)."

The Court will note that this statute has two parts.

The first part contemplates an offense against the postal laws.

The second extends the meaning and purpose of the statute.

This makes the statute unique and without precedent, unless the rule *ejusdem generis* applies.

A comparison of these statutes with the later statutes, now Title 18, section 338 (a) and 409 (d), U. S. Code, shows the word "wilfully" written into Title 18, section 89, and shows it omitted in the later statutes.

Section 89 is unique in another way. It is the first statute ever enacted by Congress dealing with the person of the President and defining a crime against his person, except the "Alien and Sedition Laws" and the laws concerning persons in the Military Service of the United States. And while the Congress has, in U. S. Code, Title 3, section 53, enacted "The protection of the person of the President and the members of his immediate family and of the person chosen to be President of the United States is authorized," there is no penal clause in this statute.

This argument is not made with the purpose of contending that Congress has not the constitutional authority to make attacks or attempts to take the life of the President a crime, but to show that it is only by a strained construction that an act of Congress can be made to go beyond the context in a matter, where Congress has always refrained from direct legislation.

In *United States v. Wiltberger*, 5 Wheaton, 76, on page 96:

> "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute is within its provisons, so far as to punish a crime not enumerated in the statute, because of its equal atrocity, or of kindred character, with those which are enumerated."

It is respectfully submitted that the petition for certiorari should be allowed and the Supreme Court of the United States, should after hearing, reverse the judgment of Circuit Court of Appeals, Fifth Circuit, and order your defendant discharged.

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Attorney for Petitioner.